STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 27, 2007
v	No. 264709 St. Clair Circuit Court
STEVEN RICHARD SMILEY, Defendant-Appellant.	LC No. 04-001808-FH

Before: Owens, P.J., and Neff and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of assault with a dangerous weapon (felonious assault), MCL 750.82. Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to 21 months' to 6 years' imprisonment. He appeals as of right. We affirm.

Defendant had a contentious relationship with his neighbors, Robert and Diana LaForge, and was not allowed on their property. On January 5, 2003, defendant drove his pickup truck to the LaForge home. Diana saw defendant drive up the driveway and notified her husband. Robert went to defendant's truck and, after banging the truck window to get his attention, told defendant to leave. Defendant yelled at Robert to stop banging on his truck and moved the truck in reverse eight to ten feet. As soon as he turned his back to defendant's truck, Robert heard the truck coming toward him. He turned back toward the truck as it moved forward but was unable to avoid its path. The front of the truck hit Robert, pinning him against the side of the house. Robert's foot slipped in a window well along the side of the house and broke the window. Defendant then backed the truck down the driveway and returned to his home across the street.

I.

Defendant argues that the trial court erroneously admitted evidence of past other acts by defendant against the LaForge family. Specifically, defendant contests the admission of evidence that he had prior convictions for stalking the LaForge family and for assaulting Diana LaForge, as well as evidence that the LaForge family had previously received personal protection orders against defendant. We disagree. We review the trial court's ruling regarding the admissibility of evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

The trial court concluded that defendant opened the door to the admission of evidence regarding his history of criminal convictions and legal proceedings involving the victim's family in the following exchange:

> *Q*. Sir, you have acknowledged in your testimony that you were not permitted to be at the LaForge's [sic] residence?
>
> *A*. There was nothing official. I just knew it would cause trouble.

Specifically, the trial court permitted the prosecutor to question defendant regarding his convictions for feloniously assaulting Diana LaForge and for stalking the LaForge family. The trial court also permitted the prosecutor to question defendant regarding personal protection orders (PPOs) that he had been issued against the LaForge family in the past.

Defendant argues that the evidence regarding his prior convictions and PPOs was inadmissible because it failed to meet the requirements of MRE 404(b). MRE 404(b)(1) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

However, the prosecutor did not embark on the disputed line of questioning to establish defendant's bad character, but to impeach him. Defendant's statement implied that his difficulties with the LaForge family arose from an inability to get along. By questioning defendant regarding his prior convictions and his PPOs, the prosecution showed that the animosity the LaForge family had toward defendant was not the result of an informal feud between neighbors, but the result of a longstanding history of criminal conduct, including violent conduct, committed by defendant against them. In addition, the prejudicial effect of this evidence did not substantially outweigh its probative value to counteract defendant's implication that he and the LaForge family could not get along, and the resulting inference that the LaForges overreacted when they saw defendant enter their driveway. Accordingly, defendant's assertion that evidence of his prior convictions and PPOs should not have been introduced is without merit.[1]

[1] Further, defendant maintained that he did not intentionally move his truck forward to pin Robert to the side of the LaForge home. Instead, defendant claimed that the truck involuntarily jerked forward when he shifted gears, causing Robert to be pinned to the side of the house. Defendant's prior convictions, especially his prior felonious assault conviction against Diana LaForge, would also be admissible under MRE 404(b) to rebut defendant's assertion that he
(continued…)

II.

Next, defendant argues that the trial court erroneously denied his request for a jury instruction regarding the offense of assault and battery, MCL 750.81. We disagree. "[J]ury instructions that involve questions of law are [] reviewed de novo." *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006), quoting *People v Schaefer*, 473 Mich 418, 427; 703 NW2d 774 (2005). However, we review a trial court's determination regarding the applicability of a jury instruction to the facts of a particular case for an abuse of discretion. *Gillis, supra* at 113.

"MCL 768.32(1) only permits instructions on necessarily included lesser offenses, not cognate lesser offenses." *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002). "A necessarily lesser included offense is an offense whose elements are completely subsumed in the greater offense." *People v Mendoza*, 468 Mich 527, 540; 664 NW2d 685 (2003). Accordingly, it is impossible to commit the greater offense without first having committed the necessarily included lesser offense. *People v Cornell*, 466 Mich 335, 355; 646 NW2d 127 (2002). Cognate lesser offenses "are only 'related' or of the same 'class or category' as the greater offense and may contain some elements not found in the greater offense." *Id.*

Assault and battery is not a necessarily included lesser offense, but a cognate lesser offense of felonious assault. See *People v Acosta*, 143 Mich App 95, 101; 371 NW2d 484 (1985).

> Assault has been defined as
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> > "any intentional, unlawful offer of corporal injury to another by force, or force unlawfully directed toward the person of another, under such circumstances as create a well-founded fear of imminent peril, coupled with the apparent present ability to effectuate the attempt if not prevented." *Tinkler v Richter*, 295 Mich 396, 401; 295 NW 201, 203 (1940).
>
> Battery is
>
> > "the wilful touching of the person of another by the aggressor or by some substance put in motion by him; or, as it is sometimes expressed, a battery is the consummation of the assault." *Id.*
>
> An assault and battery is therefore a consummated assault. [*People v Bryant*, 80 Mich App 428, 433; 264 NW2d 13 (1978).]

In other words, the offense of assault and battery occurs when an assault results in a battery.

"The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate

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accidentally pinned Robert to the side of the LaForge home with his truck.

battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). The offense of assault and battery contains an element not included in felonious assault, namely, that the defendant committed a battery on the victim. Accordingly, the offense of assault and battery is a cognate of felonious assault, meaning that it is possible to commit felonious assault without having first committed an assault and battery.[2] Because assault and battery is a cognate offense of felonious assault, MCL 768.32(1) does not permit instruction regarding this offense. See *Reese*, *supra* at 446. The trial court did not abuse its discretion when it denied the requested instruction.

III.

Finally, defendant argues that the trial court violated his Sixth and Fourteenth Amendment rights, as articulated in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), when it considered facts not established by a jury beyond a reasonable doubt when determining his minimum sentence. We disagree. In *People v Drohan*, 475 Mich 140, 143; 715 NW2d 778 (2006), our Supreme Court concluded that the United States Supreme Court's holding in *Blakely* does not apply to Michigan's indeterminate sentencing scheme. Accordingly, defendant's Sixth and Fourteenth Amendment rights were not violated.

Affirmed.

/s/ Donald S. Owens
/s/ Janet T. Neff

[2] For example, pointing a gun at an individual would be a felonious assault, but not a battery.